ATTORNEY FOR APPELLANT:

LANDOLL SORRELL
Anderson, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

ARTHUR THADDEUS PERRY
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

ANDREA NICOLE BURTON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 48A02-0606-CR-462
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MADISON SUPERIOR COURT
The Honorable Dennis D. Carroll, Judge
Cause No. 48D01-0304-FC-177

June 22, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Andrea Burton appeals her sentence following her conviction for Theft, as a Class D felony, pursuant to a plea agreement. Burton also appeals from the revocation of her probation. She presents two issues for our review:

1. Whether the trial court abused its discretion when it imposed a three-year sentence.

2. Whether Burton was denied the effective assistance of counsel during her probation revocation hearing.

We affirm.

FACTS AND PROCEDURAL HISTORY

On April 15, 2003, the State charged Burton with theft, as a Class D felony, and two counts of Forgery, as Class C felonies. On January 13, 2004, Burton pleaded guilty to theft, as a Class D felony, and, in exchange, the State dismissed the other two charges. The plea agreement provided for a six month cap on any executed sentence, but otherwise left sentencing open to the trial court's discretion. At the sentencing hearing, the trial court identified a single aggravator, namely, Burton's criminal history, and did not identify any mitigators. The trial court imposed a three-year sentence, all suspended to probation.

On March 24, 2006, the State filed a notice of probation violation alleging that Burton had been charged with five crimes while on probation. At the conclusion of the

hearing on April 18, the trial court revoked Burton's probation and ordered her to serve her previously suspended sentence. This appeal ensued.[1]

DISCUSSION AND DECISION

Issue One: Sentence

Burton first contends that the trial court abused its discretion when it imposed an enhanced sentence. In particular, she maintains that the trial court abused its discretion when it did not identify her guilty plea and the hardship on her dependents as mitigating circumstances. Sentencing decisions lie within the sound discretion of the trial court and are reviewed only for an abuse of that discretion. Powell v. State, 751 N.E.2d 311, 314 (Ind. Ct. App. 2001). If the sentence imposed is authorized by statute, we will not revise or set aside the sentence unless it is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B); McCann v. State, 749 N.E.2d 1116, 1121 (Ind. 2001).

Here, the trial court identified no mitigators, but identified Burton's criminal history as an aggravating circumstance in imposing the maximum three-year sentence. Burton's sole contention on appeal is that the trial court should have identified two mitigators. It is well settled that the finding of mitigating circumstances is within the discretion of the trial court. Hackett v. State, 716 N.E.2d 1273, 1277 (Ind. 1999). The trial court is not obligated to explain why it did not find a factor to be significantly mitigating. Chambliss v. State, 746 N.E.2d 73, 78 (Ind. 2001). An allegation that the trial court failed to identify or find a mitigating factor requires the defendant to establish

[1] Burton requested permission to file a belated notice of appeal regarding her sentence, which the trial court granted. Thereafter, Burton requested permission to consolidate her notices of appeal regarding both issues, which this court granted.

that the mitigating evidence is both significant and clearly supported by the record. Matshazi v. State, 804 N.E.2d 1232, 1239 (Ind. Ct. App. 2004), trans. denied.

First, Burton maintains that the trial court should have given her guilty plea mitigating weight. But she cannot demonstrate that her guilty plea is entitled to significant mitigating weight because she received a substantial benefit in that the State dismissed two C felony charges in exchange for her plea to the Class D felony charge. See Wells v. State, 836 N.E.2d 475, 479 (Ind. Ct. App. 2005) (holding guilty plea not worthy of significant mitigation where defendant receives substantial benefit), trans. denied. We cannot say that the trial court abused its discretion when it did not find Burton's guilty plea to be a mitigator.

Next, Burton contends that the trial court ignored "the hardship an executed sentence would pose on [her] four small children." Brief of Appellant at 7. But our review of the record shows that the trial court expressly acknowledged that proffered mitigator in imposing a suspended sentence. In particular, the trial court ordered Burton to initially serve "a couple of days" in jail. Transcript at 19. The trial court explained that it was imposing that short jail time

> so that you will know that we are absolutely serious about this matter in two ways. First, I don't want to have to send you off with small children to the DOC for two or three years. I'd rather send you to jail for a couple of days letting you know that we are absolutely serious and if you don't get your act together, the next time it will be DOC.

Id. at 19-20. Moreover, Burton's counsel stated that three years was "fine with us." Id. at 16. Thus, Burton received the sentence that she agreed to. See Gray v. State, 790

N.E.2d 174, 178 (Ind. Ct. App. 2003). The trial court did not abuse its discretion when it did not identify the two proffered mitigators.

Issue Two: Probation Revocation

Burton also contends that she was denied the effective assistance of counsel at the probation revocation hearing. There is a strong presumption that counsel rendered effective assistance and made all significant decisions in the exercise of reasonable professional judgment, and the burden falls on the defendant to overcome that presumption. Gibson v. State, 709 N.E.2d 11, 13 (Ind. Ct. App. 1999), trans. denied. To make a successful ineffective assistance claim, a defendant must show that: (1) his attorney's performance fell below an objective standard of reasonableness as determined by prevailing professional norms; and (2) the lack of reasonable representation prejudiced him. Mays v. State, 719 N.E.2d 1263, 1265 (Ind. Ct. App. 1999) (citing Strickland v. Washington, 466 U.S. 668, 687 (1984)), trans. denied. The failure to establish either prong will cause the claim to fail. Vermillion v. State, 719 N.E.2d 1201, 1208 (Ind. 1999). Even if a defendant establishes that his attorney's acts or omissions were outside the wide range of competent professional assistance, he must also establish that but for counsel's errors, there is a reasonable probability that the result of the proceeding would have been different. See Steele v. State, 536 N.E.2d 292, 293 (Ind. 1989).

Here, Burton maintains that she was denied the effective assistance of counsel when her attorney did not object to hearsay during the probation revocation hearing. She contends that she was denied her right to due process as a result. We cannot agree.

It is well settled that probationers are not entitled to the full array of constitutional rights afforded defendants at trial. Cox v. State, 706 N.E.2d 547, 549 (Ind. 1999). But "[t]he Due Process Clause of the Fourteenth Amendment [does] impose[ ] procedural and substantive limits on the revocation of the conditional liberty created by probation." Id. (quoting Braxton v. State, 651 N.E.2d 268, 269 (Ind. 1995)). In the probation revocation context, our supreme court has described a defendant's due process rights as follows:

> There are certain due process rights, of course, which inure to a probationer at a revocation hearing. These include written notice of the claimed violations, disclosure of the evidence against him, an opportunity to be heard and present evidence, the right to confront and cross-examine witnesses, and a neutral and detached hearing body. Indiana Code § 35-38-2-3(e)[] also ensures the probationer the right to confrontation, cross-examination, and representation by counsel.

Id. (quoting Isaac v. State, 605 N.E.2d 144, 148 (Ind. 1992) (citations and footnote omitted)).

Because probation revocation procedures are to be flexible, strict rules of evidence do not apply. Id. at 550. We have now codified this conclusion in our evidence rules, which provide, in relevant part, that "[t]he rules, other than those with respect to privileges, do not apply in . . . [p]roceedings relating to . . . sentencing, probation, or parole." Id. (citing Ind. Evidence Rule 101(c)). In particular, the evidence rule against hearsay does not apply in proceedings relating to sentencing, probation, or parole. See id. Further, in probation revocation hearings, judges may consider any relevant evidence bearing some substantial indicia of reliability. See id. at 551. This includes reliable hearsay. Id.

Here, again, Burton contends that her counsel was ineffective when he did not object to the hearsay testimony of the State's sole witness, Anderson Police Department Detective Mitch Carroll. Detective Carroll testified regarding his conversations with Bob Hines, the controller for Atkins, Inc., who reported that Burton had forged a payroll check from his company and cashed it. In addition, Detective Carroll testified that he spoke with a manager for First Call Temporary Services who reported that Burton had forged a check from their company, as well. The State admitted into evidence copies of both checks, which substantiate Detective Carroll's testimony. Further, Detective Carroll testified that both checks were deposited into a bank account owned by Burton.

Again, the hearsay exclusion rule is not applicable in probation revocation proceedings, and the trial court may consider all relevant evidence, including reliable hearsay. Here, there are sufficient indicia of reliability such that any objection to Detective Carroll's testimony based upon hearsay would have properly been overruled. Further, Burton's counsel thoroughly cross-examined Detective Carroll and objected to the admission of the State's exhibits. Burton has not shown that she was denied her right to due process, nor can she show that she was denied the effective assistance of counsel. See Hunter v. State, ___ N.E.2d ___, 2007 WL 1452991 at *3 (Ind. Ct. App. May 18, 2007).

Affirmed.

RILEY, J., and BARNES, J., concur.